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NTSB Order No. EA-4166

**UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.**

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 11th day of May, 1994

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DAVID R. HINSON,  
Administrator,  
Federal Aviation Administration,

Complainant,

Docket SE-12577

v.

EARL L. FRANCK,

Respondent.

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OPINION AND ORDER

The Administrator has appealed from the oral initial decision issued by Administrative Law Judge Jerrell R. Davis on January 8, 1993, at the conclusion of an evidentiary hearing.<sup>1</sup> By that decision the law judge affirmed in part an order of the Administrator suspending respondents commercial pilot certificate on allegations that he violated sections 135.5,

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<sup>1</sup>An excerpt from the hearing transcript containing the oral initial decision is attached.

135.293(a), and 135.293(b) of the Federal Aviation Regulations (FAR) , 14 CFR Part 135,<sup>2</sup> by providing air transportation for compensation or hire when he did not hold an air carrier operating certificate. The law judge modified the sanction from 90 days to 15 days.<sup>3</sup>

The Administrator asserts on appeal that the law judge erred by reducing the sanction to a 15-day suspension.<sup>4</sup> For the reasons set out below, we decline to disturb the law judge's modification of sanction. The Administrator's appeal is denied and a 15-day suspension of respondent's certificate is ordered affirmed.

According to the record, on July 23, 1991, a television news cameraman and reporter drove to Mount St. Helens in order to film

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<sup>2</sup>The pertinent regulations, which set forth training requirements for holders of air carrier (Part 135) operating certificates, are attached to this opinion as an appendix.

<sup>3</sup>On January 25, 1993, the respondent filed a notice of appeal from the oral initial decision. The Administrator has moved to dismiss respondent's appeal as untimely, citing Rule 47 of the Board's Rules of Practice, 49 CFR § 821.47, which states that a notice of appeal from an oral initial decision must be filed within 10 days after that decision has been rendered. In respondent's reply to the motion, he asserts that his notice was timely if weekends and holidays are included in the calculation. Respondent's calculations are in error. Weekends are not included in the Board's computation of time for the filing of a notice of appeal from an oral initial decision under our Rules of Practice. See Rule 821.10. Miscalculation of a filing date based on respondent's failure to follow the Board's Rules, a copy of which was provided to him, is not good cause which serves to excuse his untimeliness. Administrator v. Burr, 6 NTSB 958, 959 (1989). Because good cause has not been established for the noncompliance, respondents notice of appeal must be dismissed. See Administrator v. Hooper, NTSB Order No. EA-2781 (1988). The Administrator's motion is granted.

<sup>4</sup>Respondent has not filed a brief in reply.

the wreckage of a helicopter crash that had occurred there the previous day. They were unable to locate the wreckage in their vehicle. As they were leaving the area, the television crew noticed respondent's operation. Respondent operates a helicopter sightseeing service at the base of the mountain. He is well-known to the Federal Aviation Administration (FAA) local Flight Standards District Office (FSDO) because at the time of this operation, respondent was in the process of applying for a Part 135 operating certificate, which had not as yet been issued.

According to the testimony of the cameraman, he and the reporter approached respondent and asked if he could transport them to the crash site. They discussed the price, and respondent agreed to transport them. There was no discussion concerning the fact that respondent did not hold a Part 135 certificate and that he could only provide them air transportation for aerial photography.<sup>5</sup> Respondent transported them to the site and landed so they could photograph the wreckage. An FAA inspector happened to recognize respondent and his helicopter, both of which were visible behind the news reporter when the footage was shown on television that night. An investigation ensued.

Respondent sent a bill to the television station. It appears that subsequent to learning of the FAA investigation, respondent told the news director that there would be no charge

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<sup>5</sup>FAR § 135.1(b) (4) (iii) excludes aerial photography operations from the requirements of Part 135.

for the flight.<sup>6</sup> The law judge correctly ruled that nonetheless, the flight was for compensation and he sustained the allegations contained in the Administrator's order. See Administrator v. Platt, NTSB Order No. EA-4012 at 7 (1993) (Expectation of future economic benefits is compensation) . The law judge further ruled that the sanction should be reduced from a 90-day to a 15-day suspension because there were "extenuating or mitigating circumstances" and Board precedent warranting a reduction. (TR-130) . He explained in his decision that there was nothing in the record to suggest that the helicopter was unairworthy or that the flight involved any unsafe incident or operating practice. The law judge further cited NTSB precedent supporting imposition of a 15-day suspension.

On appeal, the Administrator argues that the law judge's reduction is out of accord with governing Board precedent and is not substantiated under the doctrine found in Administrator v. Muzquiz, 2 NTSB 1474 (1975). That is, the Administrator believes that in order for the law judge to modify sanction where all the allegations in a complaint have been established (as they have been here), the law judge must show clear and compelling reasons for any reduction from the Administrator's choice. The Administrator does not make reference to the FAA Civil Penalty Assessment Act of 1992,<sup>7</sup> nor does the law judge, although this

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<sup>6</sup>According to the news director, in that same discussion respondent talked about doing further business for the station. (TR-23).

<sup>7</sup>Pub . L. No. 102-345, 106 Stat. 923.

proceeding was heard after enactment and the Civil Penalty Act includes specific rules regarding deference by the NTSB to the sanction policies of the Administrator.<sup>8</sup> Likewise, the Civil Penalty enactment makes clear that the NTSB, and hence its law judges, have the authority to modify proposed sanctions within the constraints imposed by the sanction deference provision. As a consequence of this enactment, we have indicated that the traditional approach to sanction deference found in Muzquiz has been called into question, and that simple reliance on that doctrine may be insufficient to sustain a sanction.<sup>9</sup>

As there has been no reliance by the Administrator on any particular annunciated guidelines for the selection of sanction, we will analyze the issue of sanction with regard to precedent and with respect for the Administrator's institutional role as the regulator principally charged with fostering a safe aviation environment. We find that there has been a wide range of sanctions selected for unauthorized Part 135 operations, but that

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<sup>8</sup>The amended statutory deference provision reads:

In the conduct of its hearings under this subsection, the Board shall not be bound by any findings of fact of the Administrator *but shall be bound by all validly adopted interpretations of laws and regulations administered by the Federal Aviation Administration and of written agency policy guidance available to the public relating to sanctions to be imposed under this subsection unless the Board finds that any such interpretation is arbitrary, capricious, or not otherwise in accordance with law.* 49 U.S.C. App. 1429(a), as amended by Pub. L. No 102-305 (new matter in italics) .

<sup>9</sup>See Administrator v. Oklahoma Executive Jet, NTSB Order No. EA-3928, July 2, 1993.

the most recent and most similar of these support the suspension imposed by our law judge.

The first case relied on by the Administrator is Administrator v. Plowman, 5 NTSB 957 (1987) . In Plowman the Administrator initially sought a 60-day suspension, subsequently amended to 270 days, for a series of flights by an individual that had only recently surrendered his Part 135 charter authority. The reported facts of the case do not make clear the number of flights, or the reason that the Part 135 authority had been earlier surrendered, but it is clear that the pilot/respondent had deliberately held out his services and intentionally solicited the business of a major corporation, and that he apparently deliberately concealed his lack of authority in this solicitation process.<sup>10</sup> The law judge who heard the case reduced the sanction to six months and the Administrator did not appeal. While the Administrator believes this case to be on point, we see marked differences between the conduct in Plowman and that of respondent. These differences are epitomized by the fact that respondents single flight was not the result of any holding out on his part, but the consequence of his proximity to an unfortunate accident. That the cases are different even from the Administrator's viewpoint is seen in the fact that respondent Plowman was charged with the violation of ten separate

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<sup>10</sup>The Board's opinion indicates that the corporate client had a policy of only using Part 135 authorized carriers and cancelled an in-progress series of flights when it learned that respondent was not qualified under the appropriate regulations.

sections of the FAR's, including careless and reckless flight, while the respondent here is charged with the violation of three sections and careless or reckless flight is not among them.

The other case relied on by the Administrator is Administrator v. Sexauer, 5 NTSB 2456 (1987) . There it was alleged that the respondent had organized a series of flights, some flown personally and some with other Part 135 unqualified pilots, and had entered into a contractual arrangement with a municipality such that a claim of exception for public use aircraft was offered as a defense. Respondent was found to have repeatedly violated five sections of the FAR's, and his continued and deliberate arrangement has little in common with the fortuity of respondent Franck's violation.

The cases relied on by the law judge are Administrator v. Cason, 5 NTSB 741 (1985) and Administrator v. Mires, NTSB Order No. EA-3284 (May 3, 1991). In both these cases a 15-day suspension was upheld for a single flight of an unauthorized Part 135 nature. While the Administrator had sought a 60-day suspension in the former case, in the more recent Mires proceeding, the most recent of the cases cited, the Administrator had himself sought only 15 days. While the Administrator seeks to distinguish these cases, his arguments are not persuasive. Particularly troubling is the recency and similarity of the Mims case. The Administrator would distinguish it principally on the grounds that respondent Mires had no previous violations and, unlike respondent here, was not a Part 135 applicant.

(Consequently, the Administrator opines, Mires was not sensitized to the requirements of that Part.) But the Administrator's recitation of respondent's prior violations is a very uncharitable view of what the record actually discloses.<sup>11</sup> And the argument that respondent Mires was not sensitized to the needs of Part 135 is both unsupported by the reportage of that case and at odds with the near certainty that a commercial pilot (such as Mires) is well aware of the additional requirements for Part 135 operation.<sup>12</sup>

After reviewing the precedent and considering the advantages afforded by the hearing process for the direct observation of the respondent, we cannot conclude that the sanction of a 15-day suspension should be overturned.

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<sup>11</sup>The un rebutted evidence of record is that respondent was involved in an accident for which a mechanical failure not charged to respondent was causal, and in which respondent successfully accomplished a difficult autorotation. (Tr. 89-90). Additionally, an employee of respondents was alleged to have landed in a schoolyard, but respondent's involvement, if any, in that episode is not clear. (Tr. 75). It is noteworthy that the same FAA inspector who testified to these matters indicated that respondent ran a good operation (Tr. 75), that he was unaware of any problems with respondent's maintenance of his aircraft (Tr. 77), and that the flight in question was operated safely (Tr. 80-81) .

<sup>12</sup>In fact, the record in Mires indicates that a discussion was had with the passenger about the fact that the aircraft selected was not Part 135 qualified, but at the passenger's preference it was used in lieu of an authorized aircraft.



ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied;
2. The initial decision is affirmed; and
3. The 15-day suspension of respondent's commercial pilot certificate shall commence 30 days after the service of this opinion and order.<sup>13</sup>

VOGT , Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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<sup>13</sup>For the purposes of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f) .

## APPENDIX

### **§ 135.5 Certificate and operations specifications required**

No person may operate an aircraft under this part without, or in violation of, an air taxi/commercial operator (ATCO) operating certificate and appropriate operations specifications issued under this part, , or, for operations With large aircraft having a maximum passenger seating configuration, excluding any pilot seat, of more than 30 seats, or a maximum payload capacity of more than 7,500 pounds, without, or in violation of, appropriate operations specifications issued under part 121 of this chapter.

### **§ 135.293 Initial and recurrent pilot testing requirements.**

(a) No certificate holder may use a pilot, nor may any. person serve as a pilot, unless, since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot, on that pilot's knowledge in the following areas--

(1) The appropriate provisions of parts 61, 91, and 135 of this chapter and the operations specifications and the manual of the certificate holder;

(2) For each type of aircraft to be flown by the pilot, the aircraft powerplant, major components and systems, major appliances, performance and operating limitations, standard and emergency operating procedures, and the contents of the approved Aircraft Flight Manual or equivalent, as applicable;

(3) For each type of aircraft to be flown by the Pilot, the method of determining compliance with weight and balance limitations for takeoff, landing and en route operations;

(4) Navigation and use of air navigation aids appropriate to the operation or pilot authorization, including, when applicable, instrument approach facilities and procedures;

(5) Air traffic control procedures, including IFR procedures when applicable;

(6) Meteorology in general, including the principles of frontal systems, icing, fog, thunderstorms, and windshear, and, if appropriate for the operation of the certificate holder, high altitude weather;

(7) Procedures for--

(i) Recognizing and avoiding severe weather situations;

(ii) Escaping from severe weather situations, in case of inadvertent encounters, including low-altitude windshear (except that rotorcraft pilots are not required to be tested on escaping from low-altitude windshear); and

(iii) Operating in or near thunderstorms (including best penetrating altitudes), turbulent air (including clear air turbulence), icing, hail, and other potentially hazardous meteorological conditions; and

(8) New equipment, procedures, or techniques, as appropriate.

(b) No certificate holder may use a pilot, nor may any person serve as a pilot, in any aircraft unless, since the beginning of the 12th calendar month before that service, that pilot has passed a competency check given by the Administrator or an authorized check pilot in that class of aircraft, if single-engine airplane other than turbojet, or that type of aircraft, if helicopter, multiengine airplane, or turbojet airplane, to determine the pilot's competence in practical skills and techniques in that aircraft or class of aircraft. The extent of the competency check shall be determined by the Administrator or authorized check pilot conducting the competency check. The competency check may include any of the maneuvers and procedures currently required for the original issuance of the particular pilot certificate required for the operations authorized and appropriate to the category, class and type of aircraft involved. For the purposes of this paragraph, type, as to an airplane, means any one of a group of airplanes determined by the Administrator to have a similar means of propulsion, the same manufacturer, and no significantly different handling or flight characteristics. For the purposes of this paragraph, type, as to a helicopter, means a basic make and model.